SUPREME COURT, U. S.

in the Supreme Court of the United States

Supreme Court, U.S.
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October Term, 1970

No. 891

BLANCHE ELY PARENT TEACHERS ASSOCIATION and IRENE S. CLARKE,

Cross Petitioners,

vs.

BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, a public body organized and existing under the laws of the State of Florida; and WILLIAM C. DRAINER, Superintendent of Public Schools of Broward County, Florida; FREDERICK ALLEN and TIMOTHY ALLEN, minors by W. GEORGE ALLEN, father and next friend; and VON D. MIZELL, President of the National Association for the Advancement of Colored People, and all others similarly situated,

Respondents.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

		Page
A.	OPINIONS BELOW	2
B.	JURISDICTION	2
C.	QUESTIONS PRESENTED	3
D.	CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
E.	STATEMENT OF FACTS AND CASE	4
F.	REASONS FOR ISSUANCE OF THE WRIT	7
G.	CONCLUSION	13
	CERTIFICATE OF SERVICE	14

CITATIONS

	Page
Alexander v. Holmes County Board of Education, (1969) 396 U.S. 19	9
Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I)	5
Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II)	5
U. S. v. Jefferson County School Board, (C.A. 5th, 1966) 372 F.2d 836	10
Valley v. Rapides Parish School Board, (C.A. 5th, 1970) 423 F.2d 1132	10

OTHERS

Constitution of the United States:	
Amendment V	3
Amendment XIV, Section 1	3
Title 28 U.S.C. Section 1254(1)	2
Title 28 U.S.C. Section 1343(3)	5
Title 42 U.S.C. Sections 1983 and 1985	5
The Civil Rights Act of 1964	4

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CROSS PETITIONERS, BLANCHE ELY PARENT TEACHERS ASSOCIATION and IRENE S. CLARKE, by and through their undersigned attorneys, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals in and for the Fifth Circuit, said judgment being entered on or about August 18, 1970.

A. OPINIONS BELOW

The opinions of the courts below directly preceding this petition are as follows and are set out in the Appendix filed in connection with the original Petition for Writ of Certiorari filed herein by the Board of Public Instruction of Broward County, Florida, to-wit:

1. Findings of fact, conclusion of law and final judgment of April 30, 1970, unreported, (1a)

2. Opinion of the Court of Appeals filed August 18, 1970, not yet reported, (32a)

3. Order of August 28, 1970, unreported, (47a) with attached school superintendent's implementation report of August 24, 1970, (54a).

4. Order of September 4, 1970, unreported, (99a).

B. JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

C. QUESTIONS PRESENTED

1. Whether the decision of the District Court for the Southern District of Florida which was affirmed by the Court of Appeals providing for the phasing out of a previously all black high school, Blanche Ely High School, serves to deny to the Cross Petitioners equal protection under the law in view of the facts and circumstances of the instant case.

2. Whether the decision of the District Court for the Southern District of Florida providing for the phasing out of Blanche Ely High School without providing the Cross Petitioners with a full evidentiary hearing on the merits of such action is a violation of the due process clause contained in the Fifth and Fourteenth Amendments to the United States Constitution.

D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States, Amendment V:

> *"No person shall be . . . nor be deprived of life, liberty, or property, without due process of law; . . ."*

2. Constitution of the United States, Amendment XIV, Section 1:

> *" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."*

3. The Civil Rights Act of 1964 (Pub.Laws 88-352, Title IV, Section 401; 78 Stat. 248, 42 U.S.C.A. (Chapter 21) Section 2000c-6(a)(2) which provides in pertinent part:

> *" . . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any schools by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards . . . "*

E. STATEMENT OF FACTS AND CASE

The Cross Petitioners, Blanche Ely Parent Teachers Association and Irene S. Clarke, were designated as Intervening Defendants before the Federal District Court, and on appeal to the Circuit Court of Appeals for the Fifth Circuit were Cross Appellants. Cross Petitioners now seek to have reviewed a decision rendered by the United States Court of Appeals for the Fifth Circuit on August 18, 1970, insofar as it affirmed a portion of an earlier judgment entered by the District Court for the Southern District of Florida providing for the phasing out of Blanche Ely High School, a formerly all black high school in Broward County, Florida, and discontinuing such high school as a secondary school facility.

Initially, the Respondents, Frederick Allen and Timothy Allen, minors, by W. George Allen, father and next friend, and Von D. Mizell, President of the National Asso-

ciation for the Advancement of Colored People, brought a class action against the Respondent, Board of Public Instruction of Broward County, Florida, as Defendants, on January 9, 1970, in the United States District Court for the Southern District of Florida. Jurisdiction vested in the Court under Title 28, U.S.C. Section 1343(3), and Title 42, U.S.C. Sections 1983 and 1985. The Plaintiffs contended that the Defendants were maintaining a racially segregated dual school system in violation of the principles established in *Brown v. Board of Education*, 347 U.S. 483 (1954) (Brown I) and *Brown v. Board of Education*, 349 U.S. 294 (1955) (Brown II).

At a hearing held before the Court on or about January 16, 1970, the District Court determined that the Board of Public Instruction for Broward County, Florida, was indeed operating a dual system of schools and ordered that a plan for the implementation of a unitary school system be filed by February 16, 1970, and to elicit recommendations from the Florida School Desegregating Consulting Center in this objective. On or about March 3, 1970, a Board plan was filed, included in which was a recommendation to phase out Blanche Ely High School. The Plaintiffs objected to the Board plan and it was ordered by the District Court that the Board consult and cooperate with the Florida School Desegregation Consulting Center in the establishment of a truly unitary plan for the school system in Broward County. A final hearing was held on April 3, 1970, following the filing of the Center's report on March 27, 1970, containing a recommendation that Blanche Ely High School be phased out as a high school facility. On that same date upon which the Final Hearing was held, April 3, 1970, the Cross Petitioners, through their undersigned attorneys, were permitted to intervene in

the cause for the purpose of objecting to the phasing out of Blanche Ely High School. On that same date the District Court entered its order granting the undersigned attorneys for the Cross Petitioners leave to file a petition or objection to the proposed phasing out of Blanche Ely High School no later than April 13, 1970, but making no allowance or provision for the taking of additional testimony or evidence on this particular subject. A notice of appearance together with a petition was thereafter filed by the undersigned attorneys on behalf of Cross Petitioners on or about April 13, 1970. It should be noted that at the April 3, 1970 final hearing on the merits, the Consulting Center's plan was received without the benefit of testimony by the Court, and no opportunity to cross examine its conclusions or the bases therefore was presented to the Cross Petitioners insofar as the recommendation contained therein to phase out Blanche Ely High School was concerned.

On or about April 30, 1970, the District Court entered its findings of fact, conclusions of law and final judgment, included in which was the determination that Blanche Ely High School was not a reasonably good high school facility and should be phased out as such. No direct testimony or evidence was ever received by the Court on this issue, but its decision was apparently based upon a letter report by an alleged education expert supplied through the Florida School Desegregation Consulting Center. Blanche Ely High School at the time of the court's order was fully accredited by both the Department of Education of the State of Florida, and by the Southern Association of Colleges and Secondary Schools as a secondary school facility.

A motion for new trial was filed by the Cross Petitioners on or about May 12, 1970, in an attempt to obtain leave to take testimony and present evidence on the questions surrounding the phasing out of Blanche Ely High School, but said motion was denied by the District Court's order dated June 4, 1970. An appeal followed to the United States Circuit Court for the Fifth Circuit and in its order dated August 18, 1970, the Circuit Court held that the Record reflected the District Court's decision on this issue was based on "sound educational criteria", and the Circuit Court therefore affirmed the decision of the District Court in this respect.

F. REASONS FOR ISSUANCE OF THE WRIT

Introduction

This cause merits review on certiorari for two main reasons. First, the action taken by the District Court and affirmed by the Circuit Court served to effectively disenfranchise, if you will, the black community of Broward County, Florida, insofar as institutions of secondary education are concerned. The result was to eliminate the neighborhood school in the black community thereby requiring the busing of black children to schools in white communities—a step taken without sufficient justification in the instant case. Secondly, in the interests of stabilizing the school situation as quickly as possible, the District Court ran afoul of the due process requirements in hearings of this nature by permitting Cross Petitioners to intervene through their undersigned attorneys of record and then denying to these parties a sufficient evidentiary hearing at which they would be permitted to present testimony and evidence in support of their cause.

I

THE DECISION OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA WHICH WAS AFFIRMED BY THE COURT OF APPEALS PROVIDING FOR THE PHASING OUT OF A PREVIOUSLY ALL BLACK HIGH SCHOOL, BLANCHE ELY HIGH SCHOOL, SERVES TO DENY TO THE CROSS PETITIONERS EQUAL PROTECTION UNDER THE LAW.

The District Court approved the phasing out of Blanche Ely High School for the reason it was not a reasonably good secondary school facility. The only basis for the Court's action was a strictly hearsay declaration made by an alleged educational "expert" provided through the Florida School Desegregation Consulting Center located in Miami. The opinion itself, in sketch form, provided no explanation in detail as to the conclusions reached. The high school in question was a previously all black high school located in the black community of Pompano Beach, Florida. The Court of Appeals found that the District Court's action in phasing out Blanche Ely High School was correct as being based on sound, educational criteria, and affirmed the District Court's actions in this regard.

At the time of the School Board proposal and the lower court's actions adopting same, Blanche Ely High School was a fully accredited secondary school facility by *both* the Department of Education of the State of Florida and the Southern Association of Colleges and Secondary Schools, and had been so accredited for some years. The school system of Broward County was faced with an ad-

mitted shortage of facilities. In view of these factors the Cross Petitioners would submit the phasing out of their school was not necessitated by educational criteria, but was motivated solely and exclusively by the School Board's desire *not* to send white students into a previously all black school, in a black neighborhood, as a means of desegregating the school system concerned. Simply stated, faced with this court's uncompromising mandate to provide a unitary school system *now*, the Broward County School Board elected to proceed in a manner, and utilize a process, which was designed to deny these Cross Petitioners, and parents, teachers and children connected with Blanche Ely High School, equal protection under the law.

The process of school desegregation, and the successes reached to this date, are the result of a long, tumultuous, and heart-rending struggle by the black community for equal treatment of its teachers and children in the country's school systems, together with a search for the dignity which accompanies fair and equal treatment with all of their neighbors. It has been sixteen years since the first *Brown* decision, and now the black community has been told emphatically by this court that it shall be treated equally with the white community in the school systems and such treatment shall be afforded them now. See *Alexander v. Holmes County Board of Education*, (1969) 396 U.S. 19. Once again, however, Cross Petitioners find themselves faced with action taken by a local school board which in effect deprives them of their neighborhood school and advises them they may have a desegregated school system on the high school level, but only by having their children bused to schools in white communities, one of which is in another municipality. Such action certainly is not equal or even fair treatment under the law and violates these

Cross Petitioners' constitutional rights to equal protection of the law, and hardly provides for a truly unitary school system in Broward County Florida. See *U. S. v. Jefferson County School Board,* (C.A. 5th, 1966) 372 F.2d 836; *Valley v. Rapides Parish School Board,* (C.A. 5th, 1970) 423 F.2d 1132 (where the Court held that if pairing was a reasonably and more effective means of desegregating the school system it was a device that must be used by the local school board)

II

THE DECISION OF THE DISTRICT COURT PROVIDING FOR THE PHASING OUT OF BLANCHE ELY HIGH SCHOOL WITHOUT PROVIDING CROSS PETITIONERS WITH A FULL HEARING ON THE MERITS OF SUCH ACTION IS IN VIOLATION OF THE DUE PROCESS CLAUSE CONTAINED IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

At hearings held before the lower court on or about March 3, 1970, recommendations were made by the School Board and by the Florida School Desegregating Consulting Center to phase out Blanche Ely High School. On April 3, 1970, the Cross Petitioners were permitted to intervene in the above styled cause, through their undersigned attorneys, for the purpose of opposing the phasing out of Blanche Ely High School, and a notice of appearance was filed by Cross Petitioners' attorney of record on April 13, 1970. On the same date, April 3, 1970, final hearing was set on the merits of the cause, included in which was

whether to approve the recommendations of the School Board pertaining to Blanche Ely High School, and the above mentioned Desegregation Center's report filed March 27, 1970, as it relates to that facility. Again, on this same date, Cross Petitioners were given leave to file a written petition or objection to the phasing out of Blanche Ely High School by April 13, 1970, which was in fact done at the time Cross Petitioners' attorneys filed their notice of appearance. No allowance for the taking of testimony and evidence in support of the Cross Petitioners' position was ever made by the trial court. No allowance was ever provided by the trial court for the Cross Petitioners to cross-examine the School Board or Desegregation Center's representatives on the basis for their findings and recommendations. The Desegregation Center's plan and report of the "expert" recommending the phasing out of Blanche Ely High School was received by the lower court without the benefit of testimony or evidence concerning the basis for reaching such a recommendation. On April 30, 1970, the lower court entered its final judgment included in which was a finding that Blanche Ely High School ought to be phased out as a secondary school facility.

It is respectfully submitted that a fundamental precept of due process was violated by the trial court in failing and refusing to allow the Cross Petitioners an opportunity to present testimony and evidence to support their claims, especially when the Court saw fit to permit them to intervene as a party to the cause. Admittedly these cases are often accelerated by the courts in an attempt to speedily settle the school situation, but no case should be accelerated to such a degree that *parties* to that action are effectively denied the right to be heard by testimony and

evidence produced by competent witnesses in support of their position in the case. Indeed, had they been given this opportunity to testify and to cross-examine School Board personnel and personnel of the Desegregation Center, these Cross Petitioners are confident the "sound, educational criteria" found to be a basis for the lower court's order phasing out Blanche Ely High School would have been clearly shown to be without merit. In effect these people have been denied their rights without any hearing, administrative or judicial, and as such have been effectively denied due process of law in the worst possible manner.

G. CONCLUSION

Frankly it is the position of Cross Petitioners supported by an overwhelming majority of the people in the community, both black and white, that the Blanche Ely High School should not be eliminated, but should be maintained as a neighborhood school with white students welcome, whether by choice or by simply straightening out the boundary lines, and with black students accorded the privilege to freely transfer to other schools should they desire.

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was mailed to each of the following this _____ day of October, 1970.

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BRIEF OF RESPONDENTS BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, AND WILLIAM C. DRAINER, IN REPLY TO CROSS PETITION FOR A WRIT OF CERTIORARI FILED BY CROSS PETITIONERS BLANCHE ELY PARENT TEACHERS ASSOCIATION AND IRENE S. CLARKE

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PREFACE

Pursuant to Rule 40, Paragraph 3 of the Supreme Court Rules, the School Board and its Superintendent, Respondents in this Cross Petition for Writ of Certiorari, will proceed directly to their argument in reply to that of Cross Petitioners advanced in their brief.

REASONS FOR DENIAL OF THE WRIT

INTRODUCTION

Cross Petitioners protest the phasing out of their all-Black neighborhood school, Blanche Ely High School, located in the Black community in the north-central portion of Broward County, and they protest the expedited proceedings in this school desegregation case which they say did not give them as complete a hearing as they desire.

I

Whether the Decision of the District Court for the Southern District of Florida Which Was Affirmed by the Court of Appeals Providing for the Phasing Out of a Previously All-Black High School, Blanche Ely High School, Serves To Deny to the Cross Petitioners Equal Protection Under the Law

Respondents can readily sympathize with the desire of Cross Petitioners to maintain Blanche Ely High School as a neighborhood school in their Black community. However, all-Black schools in all-Black communities are no longer constitutionally permissible no matter how much such schools may serve as a source of pride and inspiration for the community.

Cross petitioners' real point of contention with the District Court and Court of Appeals appears to be whether the record supports the finding that the Blanche Ely school building is not an adequate physical facility for conducting a high school program.

Tht record shows that during the 1969-70 school year, Respondents operated two all-Black high schools in Broward County: Dillard High School, located approximately in the center of the county, and Blanche Ely, located in the north-central area. The all-Black

high school located in the south-central area was phased out in 1968-1969.

Respondents in their plan for a unitary school system, which was filed with the District Court on February 16, 1970, proposed that both Dillard and Blanche Ely be phased out because in their opinion neither had adequate buildings for use as a high school.

The District Court referred the plan to the Florida School Desegregation Consulting Center at the University of Miami School of Education. The Desegregation Center, as part of its review of the entire plan, made extensive examination of the physical facilities at Dillard and Blanche Ely. The actual inspections were made for the Center by Dr. William Field, a recognized expert in educational facilities and specifications. See the Center's Report, filed March 27, 1970, at page 5.

Dr. Field found that Dillard contained many more special facilities than Blanche Ely. The only minimal area was the space provided for art classes which could easily be corrected by using one of the vacated vocational shop areas. See Appendix IV to the Center's Report.

On the other hand, he found that every area at Blanche Ely was minimal except for the facilities for physical education, and that without a generous increase in space, equipment and utilities, the facilities were neither adequate to serve as a senior high school nor even as a junior high school. See Appendix III to the Center's Report.

Based upon Dr. Field's examinations and other educational considerations, the Desegregation Center rec-

ommended that Dillard be continued as a high school and that Blanche Ely be discontinued.

The District Judge, the Honorable Ted Cabot, is a resident of Broward County, and based upon the recommendations of the Desegregation Center and the School Board and his own personal knowledge of the two schools, he ordered that Dillard be continued as a senior high school and that Blanche Ely be discontinued and used instead to house Coleman Elementary School until Coleman could obtain its own modern building. Another obviously important criterion is the degree of pupil integration achieved by the desegregation plan.

During the school year, 1969-70, there were two high schools serving the north area of Broward County: Blanche Ely High School with an all-Black student body and Pompano Beach High School with an integrated student body. In the current school year, 1970-71, the percentage of black students to white at Pompano Beach High School has increased from 7.3% for 1969-70 to 22.9%. The new Deerfield Beach High School which opened for the first time on August 31, 1970, has a percentage of black students to white of 31.9%. See Student Integration Statistics attached to the District Court's order of April 30, 1970 at page 1.

Another new high school in the north area is scheduled to open in time for the 1971-72 school year. Both the site for it and the new Deerfield Beach High School have been chosen with the goal of promoting integration of student bodies in contrast to the selection of sites in the past for the old Blanche Ely High School, located in an all-Black neighborhood, and Pompano Beach High School, located in an all-White neighborhood.

In view of these many factors, the Court of Appeals found that the District Court's decision to discontinue Blanche Ely as a high school was amply supported by the record, and that there was no merit in the intervenors'-cross petitioners' objection.

II

Whether the Decision of the District Court Providing for the Phasing Out of Blanche Ely High School Without Providing Cross Petitioners With a Full Hearing on the Merits of Such Action Is in Violation of the Due Process Clause Contained in the Fifth and Fourteenth Amendments of the United States Constitution

Since manifestly the school desegregation order was going to have a tremendous impact upon the people of Broward County, the District Judge adopted a liberal policy on permitting parties to intervene so that the people could have their day in court and he could hear as broad a range of arguments as possible. In addition to cross petitioners, he allowed two other groups to intervene.

Cross petitioners submitted numerous statements, resolutions, and petitions from various community groups as a proffer of the type of evidence they would offer if the court permitted a trial on the closing of Blanche Ely. While the District Judge expressed great sympathy for cross petitioners' position, as does the School Board, there simply is no way to justify the massive re-building of an all-Black school in an all-Black neighborhood. The new replacement school is now under construction at a site which makes it easily accessible to both White and Black students.

Consequently, the District Judge concluded that to allow cross petitioners a full-scale trial on the merits

would only delay the proceedings when there was a need to formulate a desegregation plan and put it into operation at once.

Respectfully submitted,

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FREDERICK ALLEN, *et al.*

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 2

Statement 3

ARGUMENT 9

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) 11

Bolling v. Sharpe, 347 U.S. 497 (1954) 10

Brown v. Board of Education, 347 U.S. 483 (1954) 2, 10

Carter v. West Feliciana Parish School Board, 326 U.S. 290 (1970) 11

Davis v. Board of School Commissioners of Mobile County, No. 436, O.T. 1970 12

Green v. County School Board, 391 U.S. 430 (1968) 2, 10

PAGE

Haney v. County Board of Education of Sevier County, 429 F.2d 364 (4th Cir., 1970) 13

McGowan v. Maryland, 366 U.S. 420 (1961) 10
McLaughlin v. Florida, 379 U.S. 184 (1964) 10

Swann v. Charlotte-Mecklenburg Board of Education, Nos. 281 and 349, O.T. 1970 12

Statutes:

28 U.S.C. 1254(1) 2

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Opinions Below

The opinion of the Court of Appeals (Pet. App. A 32a-46a) is now reported at 432 F.2d 369 (5th Cir. 1970). The decision of the district court is unreported.

Jurisdiction

The decision of the Court of Appeals was entered on August 18, 1970. The petition for certiorari in No. 749 was filed on September 23, 1970. The petition for certiorari in No. 891 was filed on October 23, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

No. 749

Whether the court of appeals was correct in ruling that a desegregation plan which left thirteen elementary schools all-black or virtually all-black, enrolling 68% of all-black elementary students in the system, failed to meet the desegregation requirements of *Brown* v. *Board of Education,* 347 U.S. 483 (1954) and *Green* v. *County School Board,* 391 U.S. 430 (1968) where the court found that it was feasible to desegregate totally all the virtually all-black schools by pairing and clustering those schools with nearby predominantly white schools.

No. 891

Whether the courts below were correct in approving the closing of a formerly all-black high school by the school board where there was ample evidence of the physical inferiority of the facility and no alternatives were presented to the trial court by which the school could be desegregated.

Constitutional Provisions and Statutes Involved

Pertinent excerpts from the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1964 are set forth at page 5 of the petition in No. 749 and at pages 3-4 of the petition in No. 891.

Statement

No. 749

This school desegregation case was commenced on January 9, 1970 seeking injunctive relief against the continued operation of a dual, racially segregated school system in Broward County, Florida, a system which includes the city of Fort Lauderdale. At the time suit was brought there were seventeen all-black schools operating in Broward County (13 elementaries, 2 middle schools, and 2 high schools). Approximately 90.4% of the black elementary school pupils attended schools which were at least 90% black; 56.9% of the middle school black students attended schools over 99% black; and 65.5 percent of the senior high school black students attended all-black schools.

After hearings in the matter, the district court found that the board (petitioners here) was operating a dual school system in violation of the Constitution and ordered it to prepare a desegregation plan that would establish a unitary school system in Broward County. The first plan submitted by the board contained provisions for desegregating only the two all-black high schools. After a hearing was held on that plan, the board was ordered to consult with the Florida School Desegregation Consulting Center (H.E.W.), specifically with respect to desegregating the remaining all-black schools, and H.E.W. was requested to file with the court its own proposals for desegregation. The geographic zoning plan subsequently submitted by the board left ten elementary schools all-black or virtually all-black, enrolling 71% of the black elementary school population of Broward County. In contrast, the plan which H.E.W. submitted left no school all-black and reduced the percentage of black elementary students in predominantly black schools to 14%. This result was

accomplished by pairing the all-black or virtually all-black elementary schools with nearly predominantly white schools. In recommending the pairing technique, the H.E.W. report stated:

> The absence of any large concentration of black population areas in Broward County makes the effective desegregation of elementary schools a distinct possibility. In the opinion of the survey team either the rezoning or pairing of elementary attendance areas can desegregate all of the remaining all-black elementary schools with a minimum of additional busing, most of which would involve distances of less than 4 miles.
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> Rezoning may be preferred by the Broward system to pairing, but rezoning as a technique is not always feasible. In the opinion of the survey team no educational disadvantage accrues to elementary pupils in paired schools nor are paired elementary schools any more difficult to administrate.

In its final order, the district court rejected the H.E.W. recommendation on pairing and ordered implemented a modified version of the geographic zoning proposed by the board. The result of the court-ordered plan was to leave four elementary schools 100% black, and nine others with black enrollments between 90% and 99%. Sixty-three percent of the total black elementary enrollment would attend these 13 schools. In its order, the district court stated as follows with respect to other techniques for desegregating the remaining black elementaries:

> The only alternatives to leaving these schools segregated are (1) transport or "walk-in" students from noncontiguous or distant areas; or (2) "pairing" an all-white school with an all-Black school, that is, by combining the attendance areas of the "paired" schools and

> sending all students in certain grades to one of the schools and all students in the other grades to the other school. In some insances "grouping" of three or more schools is resorted to, rather than "pairing".
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> It is difficult to justify the removal of young students to distant areas for the sole purpose of integrating a school. "Pairing" or "grouping" of schools also involves the same elements of additional transportation or "walking in." The same principles apply to attempts to integrate more blacks into predominantly White schools. The time, inconvenience, and expense involved, as well as the safety factor, are all relevant to the resolution of the problem. (Petition App. 16a).

On appeal of the lower court's decision, the 5th Circuit reversed that part dealing with desegregation of elementary schools. On this matter the court below held:

> Our examination of the record before us indicates that the pairing/clustering technique can be utilized to desegregate *every one* (Emphasis in the original) of the 13 all-black or virtually all-black elementary schools envisioned in the plan approved by the district court. This desegregation can be accomplished "without creating impractical attendance zones or inordinate transportation problems." (Petition App. 40a).

The court of appeals' order directed the district court to implement specific pairing and clusterings of schools in two of the three attendance areas in Broward County. In the third area, the court suggested six alternative pairings and groupings from which the district court could select the one alternative it regarded as most feasible. (Petition App. 40a-43a). The district court was directed to deter-

mine the arrangement of grade structures in all the combined schools[1] and was permitted to order alterations and adjustments in its discretion to the extent that such changes would not diminish the degree of desegregation projected by the court of appeals' decision. Concluding its order, the court of appeals indicated:

> It is axiomatic, of course, that the school board and the district court are under a continuing duty to appraise the school system in light of the actual conditions and experience and, within limits we have just indicated, to make whatever changes are necessary, now and in the future, to assure the continued maintenance of a unitary system. (Petition App. 44a).

Upon remand, after hearing arguments from both parties and receiving recommendations from the board, the district court on August 28, 1970, ordered implemented the pairing and clusterings in the two school attendance areas specifically required by the court of appeals, selected the plan it regarded as most feasible for the third attendance area out of the six recommended by the appellate court, and designated how grades would be assigned among the paired and grouped schools. Subsequently, on September 4, 1970, the district court postponed until November 15, 1970 full implementation of the court of appeals order requiring pairing and clustering. Until that date, the board was permitted to operate according to the desegregation plan originally ordered by the district court which had been reversed on appeal. Several petitions of the board to the Fifth Circuit for rehearing, rehearing *en banc*, a stay order

[1] The court of appeals recommended that grades in the combined school not be "split", i.e., assigning a particular grade to more than one school in the group, but allowed "splitting" where the degree of desegregation in any attendance zone was not diminished. (Petition App. 43a).

and recall of the mandate were denied by the court of appeals. However, on November 2, 1970, that court stayed the order of the district court of September 4, 1970 "until further orders of this court" and took the board's most recent supplemental petition under advisement. As a consequence, the Broward County school system continues to operate in accordance with the original geographic zoning plan approved by the district court rather than with that involving pairings and clusterings required by the Fifth Circuit.

No. 891

The first hearing in the district court on the complaint seeking desegregation of the dual school system in Broward County was held in January 16, 1970. One month later, on February 16, 1970, the board (petitioners in No. 479, respondents in No. 891) submitted a proposed plan of desegregation to the district court which contained, among other provisions, a statement of the intention to close ("phase-out") the Blanche Ely High School, located in Pompano Beach, Florida. A hearing on the board's plan was held on March 3, 1970 at which time an attorney indicated to the court that he represented the Blanche Ely Parent Teachers Association (petitioners here), a group that opposed the closing of Ely High School, and intended to seek intervention in the desegregation litigation to protect that group's interests. No appearance of counsel nor petition for leave to intervene was filed on behalf of Blanche Ely Parents between March 3 and April 3, 1970. Final hearing in this matter was held in the lower court on April 3, 1970. At that hearing, a second attorney appeared, stated that he represented the Blanche Ely Parent Teachers Association and requested leave of the court to intervene. Leave was granted on April 7, 1970. On April 13, 1970 the second attorney filed his notice of appearance and a petition for leave to inter-

vene. In support of its opposition to the closing of Blanche Ely High School, the Parent Teachers Association appended to its petition documents indicating that Ely was a duly accredited facility, resolutions from community groups in Pompano Beach and telegrams from citizens opposing the closing of Ely. In its final order of April 30, 1970, the district court approved the board's plan to close Ely finding "that it [Ely] was not a reasonably good high school facility, being deficient in every area, excepting physical education." [Petition App. 14a, No. 749]. In addition to having the board's recommendations on Ely, the district court also had before it findings of an expert in educational facilities and specifications hired by H.E.W. which concluded that Ely was an inferior high school plant. In accordance with the board's request, the district court ordered the Ely facility used in 1970-71 to house students from an all-black elementary school that was being closed. On May 11, 1970, the Ely Parent Teachers Association moved for "a new trial and a full trial." The district court denied that motion on June 4, 1970, reiterating its grounds for allowing Ely to be closed (reports of independent experts as to its inadequacy) and its reasons for rejecting the arguments of the Ely Parent Teachers Association (inconclusiveness of accreditation ratings and lack of probative value of the resolutions and telegrams).

The Ely Parent Teachers Association filed a cross-appeal, after plaintiffs appealed seeking review of the lower court's order respecting desegregation of the 13 all-black elementary schools in Broward County. As cross-appellant, it sought reversal of the decision to close Ely High School and argued, along with plaintiffs, that the over-all plan approved by the district court was constitutionally inadequate. In support of its position, the Parent Teachers Association submitted two documents, a certificate of accreditation given

Ely by the Southern Association of Colleges and Schools and an evaluation done of Ely by the same Association in April, 1967. The court of appeals affirmed the closing of Ely stating:

> We are not persuaded that we should order the district court to require the reopening of Blanche Ely as a high school. There is nothing in the record to indicate that the Board's decision to close Blanche Ely was based on anything other than sound educational criteria. Moreover, the record amply supports the district court's finding that the Blanche Ely facility is not an adequate physical facility for conducting a high school program. In the light of these factors, we find no merit in the intervenors' objection to the closing of the school. (Petitioners App. 36a-37a, No. 749).

ARGUMENT

I.

The two issues raised by the board's petition are controlled by previous decisions of ths Court. There are no other issues presented to warrant granting a writ of certiorari. The board's first argument contends that the order of the court of appeals which requires the pairing and grouping of some, but not all, schools in Broward County to desegregate the dual system works a denial of equal protection upon those students attending the paired and grouped schools. The concept of equal protection, embodied in both the 5th and Fourteenth Amendments, forbids state or federal government to establish arbitrary, irrational distinctions among classes of persons. If distinctions are made by a governmental entity which works a hardship upon one or more classes as compared to others, such distinctions

must be justified in terms of being reasonably related to a legitimate governmental purpose. *McGowan* v. *Maryland,* 366 U.S. 420 (1961); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

With respect to the problem of segregated public education, this Court, since *Brown* v. *Board of Education,* 347 U.S. 483 (1954), has put states and all courts, state and federal, on notice that dual school systems of black and white schools must be dismantled "root and branch" and unitary, non-racial systems established in order to comply with the Constitution. In *Green* v. *County School Board,* 391 U.S. 430 (1968) this Court required school boards to present, and federal courts to demand, desegregation plans which offered meaningful prospects of achieving immediate and complete disestablishment of dual school systems. What the board challenges in this case is the fact that the court below fulfilled its responsibility under *Brown, supra* to desegregate totally the school system in Broward County. The simple answer is that whatever distinctions were made by the court between classes of school children were justified because they were intimately related to a legitimate constitutional purpose, — desegregation of the school system. Some schools were involved in the desegregation process more than others because of their proximity to schools of heavy black concentration. Nothing in the Fourteenth Amendment warrants denominating this desegregation process as a denial of equal protection. And in any event, if petitioners' analysis were adopted, it could be argued that school boards have traditionally discriminated against various classes of school children by assigning some, but not all, to K-6 schools, some to K-3 schools, some to new schools, some to old schools, some to schools with specialized teaching staffs and equipment, *ad infinitum.* It is difficult to see the constitutional distinction between

assigning children to schools of differing grade levels to achieve desegregation and such assignments as a consequence of normal school administrative procedures.

The board further contends that the court of appeals order denied due process under the Constitution. This argument has no more merit than the first. As the record in this case reflects, the district court received extensive information from not only the board, but also from H.E.W. experts and private plaintiffs with respect to desegregating the Broward County school system. In its final order, the district court rejected the H.E.W. recommendations for pairing and grouping the all-black elementary schools with nearly predominantly white schools because it did not favor the use of such techniques, not because they were infeasible or unworkable. In so doing, the court acted in conflict with this Court's holdings in *Green, supra.* The court of appeals, armed with extensive information on pairing and clustering and the fact of the lower court's error of law, was able to devise an effective desegregation plan relating solely to elementary schools. The other areas of concern which the district court evaluated and ruled on in accordance with *Green, supra,* were left untouched by the appellate court. And, as indicated above, crucial decisions on the arrangement of grade structures in the paired and grouped schools, which set of pairings and groupings would be appropriate for the last of three attendance areas (out of a list of six alternatives) and the extent to which the court of appeals plan should be modified or altered in the future were all left to the discretion of the district court on remand, based upon its experience, familiarity with local conditions, and ability to consult with board officials. According to this Court's strict instructions in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969) and *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970) dual

school systems were to be ended immediately, not later than February, 1970 in the *Carter* cases. The court of appeals in this case made an exemplary attempt to meet its constitutional responsibility, while at the same time permitting board officials and the district court to make whatever alterations were necessary in the desegregation plan without reducing the degree of disestablishment of the dual system its order achieved. Its action was in complete accord with the requirements of procedural due process. Insofar as petitioners in No. 749 seek review of the questions of racial balance and busing which they contend are raised by this record, this Court presently has before it two cases, *Swann* v. *Charlotte-Mecklenburg Board of Education,* Nos. 281 and 349, this Term, and *Davis* v. *Board of School Commissioners of Mobile County,* No. 436, this term, in which those issues have already been extensively briefed and argued. To the extent that decisions in those cases may affect the issues decided in this case, appropriate motions for supplemental relief or modification may be presented to the courts below.

II.

Petitioners in No. 891 present equal protection and due process arguments as well to support the contention that the lower courts erred in allowing Ely High School to be closed. On the matter of denial of equal protection, the Ely Parent Teachers Association has not presented evidence in any court that refutes the determination made by the board and an outside educational expert that Ely High School was an inadequate, inferior secondary school facility. Documents indicating Ely's accreditation and a three-year-old evaluation of its facilities established nothing with respect to the physical conditions at the high school. The record, therefore, reflects a sufficient educational, non-racial basis for the district court's decision to close Ely. Furthermore,

by closing Ely, the district court thereby increased the degree of desegregation in surrounding, physically superior high school facilities, which it was required to do under *Brown, supra* and *Green, supra.* With respect to the contention that the district court denied the Ely Parent Teachers Association due process of law, the record is also dispositive. First, the Association procrastinated an entire month, from March 3 to April 3, 1970, before actually filing a petition to intervene. April 3 was, of course, the date scheduled for final hearing in this matter. Second, the Association's evidence in support of its opposition to the closing of Ely was then and has always been documentary. That the district court refused to allow the Association to put on testimony in support of inconclusive documentary evidence cannot be regarded as a denial of due process. Finally, it is evident, especially in the petition itself (page 13) that what the Association seeks is the continuation of Ely High School at any cost, irrespective of whether the facility is desegregated, predominantly black or even all-black. The decisions of this Court precluded the district court and court of appeals from agreeing to the demands of the Association to keep Ely open even as an all-black facility.

Certainly the issue of black school closings as a consequence of the desegregation process presents constitutional questions, which on a record quite different from the one in this case, may have to be considered by this Court. See *Haney* v. *County Board of Education of Sevier County,* 429 F.2d 364 (8th Cir., 1970). Here, nothing in the record indicates that the court below or the district court acted arbitrarily or discriminatorily in ordering the closing of Ely High School.

CONCLUSION

For the foregoing reasons, the petitions in Nos. 749 and 891 for writs of certiorari should be denied.

Respectfully submitted,

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